United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-1081

To be argued by
ALAN R. KAUFMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1081

UNITED STATES OF AMERICA,
Appellee,

—v.—

FERNANDO ECHEONA-MENDOZA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALAN R. KAUFMAN,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Fernando Echeona-Mendoza appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on March 14, 1975, after a four-day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 75 Cr. 60, filed January 20, 1975, charged Fernando Echeona-Mendoza in Count One with conspiracy to violate the federal narcotics laws, and in Count Two with possessing with intent to distribute, and attempting to so possess, approximately one kilogram of cocaine on November 17, 1974, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), 846 and 963.*

* Indictment 75 Cr. 60 superseded Indictment 74 Cr. 1111, which had been filed on November 25, 1974.

Trial commenced on January 22, 1975, and ended on January 29, 1975, when the jury convicted Echeona on both counts.

On March 14, 1975, Judge Owen sentenced Echeona to concurrent terms of four years imprisonment on each count, followed by a special parole period of three years.

Echeona is currently serving his sentence.

Statement of Facts

The Government's Case

In December, 1972, Fernando Echeona-Mendoza, in Barranquilla, Colombia, told Raul Alvarez-Diaz that he would be returning to New York, and that when Alvarez came to New York, Alvarez should contact him for the purpose of arranging cocaine deals.* (Tr. 24-26, 181-184).** Alvarez and Echeona met in New York in the summer of 1973, and agreed to remain in touch with each other in case either learned that cocaine was being brought in from Colombia. In October, 1973, in Barranquilla, Roberto Albarracin-Gomez and Rafael Vergara met to discuss the smuggling of cocaine into the United States.*** Vergara, who had previously sent cocaine into the United States using Albarracin as a courier, told Albarracin that he had sent a kilogram of

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* Raul Alvarez-Diaz was a named defendant in 74 Cr. 1111. He pleaded guilty to Count One and was sentenced to two years imprisonment. Alvarez was named as a co-conspirator in Indictment 75 Cr. 60, and testified on behalf of the Government.

** "Tr." refers to the trial transcript.

*** Albarracin and Vergara were named as co-conspirators in Indictment 75 Cr. 60. Albarracin had been arrested in Miami, Florida on November 16, 1974 when he was bringing cocaine into the United States destined for Alvarez, and thereafter, Echeona. He pleaded guilty in the Southern District of Florida, received a one year sentence, and testified for the Government at Echeona's trial.

cocaine into Miami, but that he needed a customer for it, and asked Albarracin if he knew of one. Albarracin did not, but found Pablo Selgado, who did. Selgado told Vergara and Albarracin that he had heard from Echeona in New York, and Echeona had said that he, Echeona, had met Alvarez and that they could handle cocaine coming in from Colombia. Within a few days Vergara left Barranquilla and was gone for about 20 or 30 days. (Tr. 27-28, 110-119).

In November, Vergara came to New York and met Echeona, who introduced Vergara to Alvarez. Alvarez told Vergara that he could find a customer for Vergara's cocaine. The financial arrangements were that the base price for the cocaine was $9,000; out of that, Echeona and Selgado each would receive $1,000, with the remainder being Vergara's; and that Alvarez would keep whatever he could obtain in excess of the $9,000 base price. That night, Alvarez contacted a man named Carlos who agreed to buy the cocaine for $10,000. Vergara, Echeona, Alvarez, and Carlos met at the Rio Bar, and then they all drove Vergara to pick up the cocaine. Vergara gave the cocaine to Carlos, who handed the $10,000 to Vergara. Out of that, Vergara gave $1,000 to Alvarez and $1,000 to Echeona (Tr. 28-37).

At the time of this transaction, Vergara, Alvarez and Echeona entered into an agreement covering future shipments of cocaine. Vergara would contact either Alvarez or Echeona when a shipment was going to come in, and they would arrange for a customer. Vergara's courier would thereafter deliver the cocaine to Alvarez. If Alvarez had located a customer, he would sell the cocaine directly. If unable to find a customer, he would deliver the cocaine to Echeona, who would sell it. Alvarez and Echeona's compensation depended on who actually made the connection with the customer for a particular shipment and the price at which he was able to sell it, with the other being guaranteed $500 to $1,000. (Tr. 37-38).

When Vergara returned to Barranquilla, he told Albarracin that he had met with Echeona, that Echeona introduced him to Alvarez (whom he knew as Wilfredo), and that Alvarez had found a customer for the cocaine. (Tr. 119).

In April, 1974, Vergara sent Albarracin to New York with 600 grams of cocaine. Albarracin gave the cocaine to Alvarez, who sold it for $13,000. Out of that $13,000, Alvarez gave $10,800 to Albarracin, who returned to Barranquilla and gave the money to Vergara. Pursuant to their earlier agreement, Alvarez gave $500 to Echeona as his commission. (Tr. 39-46, 120-124).

In the early part of June, 1974, two women contacted Alvarez, saying that they had come from Vergara with another shipment. Alvarez met them and examined the cocaine that they brought. He determined that it was of poor quality and rejected it. After the women left, Alvarez contacted Echeona and informed him of what had happened. Echeona said that he would get in touch with Vergara. Alvarez went to Florida for a few weeks, and upon his return, he met with Echeona. Echeona told Alvarez that he had not been in touch with Vergara, but that he, Echeona, had been trying to get in touch with Alvarez because while Alvarez was away, a courier from Pablo Selgado had come in with cocaine, which Echeona had sold. (Tr. 46-50).

During the rest of the summer, Echeona and Alvarez had a number of conversations about whether either had heard about any shipments due to arrive. Nothing happened, however, until October, 1974, when Alvarez received a letter from Vergara in which Vergara apologized for the bad cocaine, and asked if Alvarez would be willing to accept a shipment of good quality. Alvarez wrote back to Vergara, agreeing to accept a shipment if it was good quality cocaine. Alvarez then called Echeona, and told Echeona

that Vergara would be sending in some good cocaine. Echeona said that he had a customer with ready money for cocaine, and that when the shipment arrived, Alvarez should contact Echeona. (Tr. 51-54)

On November 16, 1974, Albarracin was set to bring one kilogram of Vergara's cocaine from Colombia to Alvarez in New York. Upon boarding the plane in Barranquilla, Colombian policemen searched Albarracin, and found 700 grams of the cocaine taped around his waist. The Colombian police seized that cocaine along with $200 that Albarracin had and then allowed him to board the plane. The Colombian police failed to discover an additional 300 grams of cocaine that Albarracin had hidden in his shoes. Albarracin (using the name Antonio Alvarez) flew to Miami, where a Customs agent searched him and found the remaining cocaine. (Tr. 124-126, 137-139; GX 6 and 7).

Upon being turned over to agents of the Drug Enforcement Administration, Albarracin agreed to cooperate, and told the agents that he was supposed to deliver the cocaine to Alvarez. He agreed to go through with the delivery to Alvarez. In preparation for this, the agents prepared what is called a "dummy load"—they extracted about 30 grams of cocaine from what had been seized, and combined those 30 grams with a sufficient amount of a look-alike non-narcotic substitute to total one kilogram. (Tr. 127, 143-149; GX 7 and 8).

On November 17, 1974, Albarracin, in the continued custody of agents of the Drug Enforcement Administration, flew to New York. A controlled delivery of the dummy load to Alvarez was arranged, and Alvarez was arrested after the delivery took place. Alvarez agreed to cooperate and told the agents that he was supposed to deliver the cocaine to Echeona. He agreed to go through with the delivery to Echeona. (Tr. 54-56, 59-60, 127-130, 149-150, 173-176).

Alvarez telephoned Echeona from the Drug Enforcement Administration office on West 57th Street to arrange the delivery of the kilo of cocaine as previously discussed by Echeona and Alvarez. The call was recorded. The conversation which took place was, in part, as follows:*

"* * *

Echeona Ah. What can I do for you, my little brother?

Alvarez Well, nothing. It's just that those people have arrived.

Echeona Yes?

Alvarez Yes, they're already here, so I wanted to know whether you had ready what you told me about—whether that fellow was there with the money to, to make the business.

(Pause)

Echeona Why don't you come here to talk?

Alvarez I go there?

Echeona Yes.

* * *

Alvarez I'm going to take it to you at the same time, okay?

Echeona O-Huh?

Alvarez I'm going to take it up there.

Echeona Okay."

After the telephone conversation, at about 10 p.m., Alvarez went to meet Echeona at the corner of 139th Street and Broadway. The agents had given the dummy load, contained in a black vinyl carrying bag, to Alvarez. (GX 3). Echeona entered Alvarez's car and they drove around the block. Echeona said that his customer did not have enough

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* This conversation is taken from the English translation transcript (GX 4A), which was stipulated to be an accurate translation of the tape, which was in Spanish. (GX 4).

money for the cocaine, but Echeona agreed to keep the cocaine until another customer could be found. Alvarez gave the bag to Echeona, who put it on the floor in front of him, between his legs. At this time the agents arrested Echeona while he was still in the car, and they seized the bag containing the dummy load which was still between his legs. (Tr. 76-78, 159-164, 177-181).

The Defense Case

Echeona testified in his own behalf and admitted knowing Alvarez and Albarracin, though he denied ever having any narcotics dealings with them. (Tr. 226, 229, 275-276). In fact, Echeona testified that he only saw Alvarez once in New York, about a year and a half prior to November 17, 1974. (Tr. 232-233). Echeona's explanation of the events of November 17 was that he thought that Alvarez wanted to see him because Alvarez had news from Colombia, and that he did not understand any of Alvarez's references to doing "business" or about the "fellow with the money"; that he dressed and went downstairs to meet Alvarez to see what it was that Alvarez had to tell him; that Alvarez asked him for money but he refused and insisted that Alvarez drive him back to his apartment building, at which time he was arrested; that he never saw the black vinyl carrying bag in the car. (Tr. 234-236, 238-240, 270-275, 316, 320-325).

Echeona repeated at trial a post-arrest statement he made on November 18, 1974 (before he was aware that his conversation with Alvarez had been recorded) that Alvarez had told him during that telephone conversation that someone had come from Colombia with news of his family. This was shown to have been a false exculpatory statement since there was no mention in the recording of that conversation of someone coming from Colombia with news of Echeona's family. Echeona's lame explanation was that he construed "those people have arrived" to have meant that. Echeona also found it difficult to explain why he insisted that Alvarez

come to his apartment at 10:00 at night simply to tell him what the news was from Colombia, instead of merely asking Alvarez to tell him the news over the telephone. (Tr. 184-187, 236, 271, 303-315).

The Government's Rebuttal

When Alvarez was arrested, he had in his possession two cards, one of which (GX 2) referred to Echeona's original residence (571 W. 139 St., Apt. 62), and the other (GX 1) referred to Echeona's next residence (Apt. 34 in the same building) and telephone number there (862-0827). Echeona admitted that the cards were in his handwriting, and that they accurately reflected his original and subsequent residences and telephone number. He testified that he must have given both cards to Alvarez at the same time, on the one occasion he met Alvarez in New York, some time in the summer of 1973. (Tr. 56-59, 289-297, 316-320).

In rebuttal, the Government called an investigator for the New York Telephone Company who produced the telephone line card for 862-0827, which showed that that telephone number was an unpublished number, and was installed at 571 West 139th Street on April 5, 1974. (Tr. 344-346).

ARGUMENT

The District Court was correct in upholding the redaction of a document turned over to the defense pursuant to Title 18, United States Code, Section 3500.

Pursuant to Title 18, United States Code, Section 3500, the Government turned over to the defense a number of documents relating to the testimony of Roberto Albarracin-Gomez. Of these documents, one (GX 3502(B) for identification)—a three-page debriefing report made by an agent of the Drug Enforcement Administration two days after Albarracin's arrest in Miami, Florida—had portions redacted. In general terms, the portions redacted from GX 3502(B) related to the details of specific cocaine transactions in which Albarracin had participated between February, 1972 and June, 1974, none of which involved either Echeona or Alvarez. The Government submitted the complete report (GX 3502(B)(1) for identification) to the trial judge, with the redactions outlined thereon, for *in camera* examination. After examination, the trial judge sustained the Government's redactions and sealed the complete version for possible appellate review (Tr. 129, 132).*

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* Presumably for the purpose of implying underhanded conduct on the Government's part, Echeona describes what occurred with regard to the redacted exhibit as follows (Brief at 11):

> "After the direct examination of Albarracin-Gomez, the Government, pursuant to the requirement of the Jencks Act, 18 U.S.C. § 3500, turned over a redacted portion of this statment to federal agents. When defense counsel objected, the entire statement was turned over to the District Court for inspection in camera."

Much of this is entirely misleading. In fact, the Government turned over the redacted report to defense counsel prior to a luncheon recess during the direct testimony of Albarracin. The prosecutor at that time specifically stated that the copy of the report being

[Footnote continued on following page]

At the close of the Government's case, Echeona again objected to the redactions, claiming that the material therein constituted information which had to be disclosed under *Brady* v. *United States*, 373 U.S. 83 (1963). The focus of the objection below was that the redacted portions identified individuals who were criminal associates of Albarracin who could possibly contradict Albarracin's testimony and therefore be potential defense witnesses. In view of the entirely speculative nature of that argument, the court below properly denied the objection upon the Government's assurance that it knew of no *Brady* material contained within that particular report or anywhere else. (Tr. 212-224).

On appeal, Echeona repeats the Section 3500 and *Brady* arguments raised below, adding further elaborations to the latter. None of them has any merit.

First, Echeona claims that the trial judge violated Section 3500 in not requiring that the Government furnish an unredacted copy of the debriefing report. As a preliminary matter, of course, whether a prior statement by a prosecution witness is sufficiently related to the subject matter of his direct testimony to warrant a direction to the Government to disclose it is a matter for the trial judge's discretion, and his decision is subject to reversal only if clearly erroneous. *United States* v. *Gugliaro*, 501 F.2d 68, 72 (2d Cir. 1974); *United States* v. *Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied*, U.S. (1974); *United States* v. *Covello*, 410 F.2d 536 (2d Cir. 1969), *cert. denied*, 396 U.S. 879 (1970).

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furnished to defense counsel had been redacted and that he would furnish an unredacted copy to the Court. (Tr. 129). After the luncheon recess and the completion of Albarracin's direct testimony, defense counsel asked for a sidebar conference and objected to the redaction. By that time, the Court already had its copy of the unredacted version. (Tr. 132).

Since the redacted portion of the report in no way related to Albarracin's testimony in this case, Judge Owen's ruling was plainly not an abuse of discretion. *United States* v. *Pacelli, supra,* 491 F.2d at 1119-1120. *United States* v. *Umans,* 368 F.2d 725, 731 (2d Cir. 1966), *cert. denied,* 389 U.S. 80 (1967); see generally, *United States* v. *Birnbaum,* 337 F.2d 490 (2d Cir. 1964); *United States* v. *Cardillo,* 316 F.2d 606 (2d Cir.), *cert. denied,* 375 U.S. 822 (1963).

Echeona's claim under *Brady* v. *Maryland, supra,* warrants equally short shrift, but because his arguments rest, we respectfully submit, on a distortion of the obligations imposed on the Government by *Brady,* a more complete response is warranted.

First, of course, this case is not, strictly speaking, a case governed by *Brady* v. *Maryland, supra.* "In . . . *Moore* v. *Illinois,* 408 U.S. 786, 794 (1972), the Supreme Court reiterated that '[t]he heart of the holding in *Brady* is the prosecution's *suppression of evidence,* in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or punishment.' (Emphasis supplied) . . . Applying *Brady's* rationale here, it is readily apparent that an essential element is missing. There was no suppression of exculpatory evidence. On the contrary, the government turned over the requested . . . [material] to the trial judge for an *in camera* inspection and ruling." *United States* v. *Ruggiero,* 472 F.2d 599, 604 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973). See also *United States* v. *Gugliaro, supra,* 501 F.2d at 73. Echeona's claim thus turns, not on a failure of the Government to do its duty under *Brady,* but on whether the trial judge abused his discretion in not furnishing Echeona with the unredacted report. The cases decided under *Brady* are only relevant in that they establish that the Government was

under no obligation whatsoever to reveal, even to the Court,* the portions of the report that were redacted, from which it follows *a fortiori* that Judge Owen can hardly have abused his discretion in withholding them from the defense.

Echeona's argument under *Brady* appears to be generally grounded on the notion that material "which could be used by the defense to impeach" Albarracin was *ipso facto* producible under *Brady*. (Brief at 12). Such an argument is, of course, disposed of by *Moore* v. *Illinois*, *supra*, in which certain prior statements of a witness and a diagram "suppressed" by the prosecution would have been of substantial assistance to the defense for impeachment and otherwise. However, the Court found that the diagram and the earlier inconsistent statements of the witness were not sufficiently "material to the issue of guilt", 408 U.S. at 797, to be producible under *Brady*. See also *United States* v. *Pfingst*, 490 F.2d 262, 277 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974). A similar observation is *a fortiori* appropriate here. The redacted portions of the report did not contradict Albarracin's testimony, and concerned unrelated narcotics transactions by Albarracin. Moreover, Albarracin never testified to a cocaine delivery to Echeona and indeed was a secondary witness against Echeona. With respect to the narcotics transactions central to this case, the person to whom Albarracin always delivered was Alvarez, as clearly demonstrated by the controlled delivery to Alvarez on November 17, 1974. Alvarez was the crucial Government witness against Echeona,** for it was Alvarez,

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* We, of course, recognize that if there is any doubt about whether specific material is producible under *Brady*, the proper course is to submit the material to the trial judge *in camera* to determine whether it should be disclosed to the defense. See, e.g., *United States* v. *Acarino*, 408 F.2d 512, 516 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969).

** This fact is reflected by the trial record. Alvarez was the subject of substantial cross-examination (Tr. 80-103); Albarracin was virtually ignored (Tr. 133-136).

not Albarracin, who testified that the cocaine Albarracin was caught with was destined for Echeona. Thus the details of Albarracin's unrelated narcotics transactions can hardly have been "material" within the mean of *Brady*.

Specifically, Echeona claims that the redacted portions of the report were producible since they included "admissions by Albarracin-Gomez of his other current criminal activities, admissions which could be used to impeach his character and the credibility of his testimony in this case. See *e.g. United States* v. *Seijo*, [Dkt. No. 74-2313 (2d Cir., April 23, 1975)]." (Brief at 13). This argument is, of course, simply wrong. *Seijo*, on which Echeona relies, involved a failure to produce evidence establishing that the Government's principal witness had a recent felony conviction which he had falsely denied, this Court found, on the witness stand. None of the information in the redacted portions of the report involved any prior convictions of Albarracin for felonies. It is settled in this Circuit that ". . . a witness' prior acts of misconduct are not admissible to impeach his credibility unless the acts resulted in the obtaining of his conviction." *United States* v. *Semensohn*, 421 F.2d 1206, 1208 (2d Cir. 1970). Judge Owen was hardly required to furnish Echeona with material which Echeona now asserts he sought for an improper use.

The second use to which Echeona now says he could have put this redacted information was in showing Albarracin's narcotics activities with others, which, he claims, would have supported an argument that Albarracin and Alvarez ". . . were actually transacting in drugs with other persons but had entrapped Echeona-Mendoza in order to protect the persons to whom the drugs were actually to be delivered." (Brief at 13). Factually, this contention cannot withstand scrutiny, since Albarracin never testified that he intended the cocaine to go to Echeona; rather his testimony was he had simply been instructed to deliver it to Alvarez. (Tr. 119-120). The redacted portions of the

report by no stretch of the imagination could have been used for the purpose now contended. As a legal matter, Echeona knew at trial that Albarracin had been involved in numerous drug transactions with and apart from Alvarez.* He could have attempted to explore those transactions on cross-examination, had he so chosen, and indeed his one foray into this area, apparently abandoned for tactical reasons, met with no interference by the Government or the Court.** The Government had no obligation under *Brady* to furnish Echeona with the details of these transactions, for Echeona knew more than enough as it was to explore them had he wished to do so. *United States* v. *Stewart*, Dkt. No. 74-2468 (2d Cir., March 26, 1975), slip op. at 2532; *Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974). Indeed, this point, we respectfully submit, warrants of itself rejection of all of Echeona's *Brady* claims.***

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* The report furnished to defense counsel, even as redacted, states (at ¶ 7): "The defendant stated to S/A Perez that he can remember making 4 (1 kilo cocaine) deliveries to Miami, Fl. and 5 (1 kilo cocaine) deliveries to N.Y. one of which was a delivery of 1¼ kilo." (GX 3502B). In addition, Albarracin mentioned a one kilo cocaine delivery to Miami in the course of his direct testimony. (Tr. 109).

** "Q. At that time did he [Vergara] go into business himself with 700 grams of cocaine?

A. On a previous occasion I had brought already one kilo that belonged to him in partnership with Alfonso Escoria.

Mr. Curley: No further questions." (Tr. 136).

*** We by no means intend to suggest that, had Echeona not been aware that Albarracin had been involved in other narcotics transactions, the Government would have been obliged to tell him so. The Government's obligation under *Brady* is to inform the defendant of facts of which he is ignorant and which are material to guilt or punishment. This may involve informing a defendant of prior misconduct of a Government witness not the subject of a conviction to the extent that such misconduct is reflected by (1) a pending indictment against the witness, *United States* v. *Houle*, 490 F.2d 167, 170-171 (2d Cir. 1973), *cert. denied*,

[Footnote continued on following page]

Third, Echeona claims that the redacted material could have been used to impeach Alvarez, assuming that Alvarez was mentioned in connection with Albarracin's other transactions in the redacted material. As examination of the material in GX-3502(B)(1) reveals, Alvarez was in no way mentioned in those transactions.

The final basis on which Echeona claims he was entitled to the redacted material is that since it contained the names of others with whom Albarracin and Alvarez were dealing in drugs, "it provided potential witnesses who might be called by the defense" to contradict Alvarez' and Albarracin's testimony in some way. This argument is, of course, entirely speculative. More important, it overlooks the crucial point that *Brady* is intended to require the Government to furnish evidence favorable to the defendant and material to guilt or punishment, not to require "that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case", *Moore* v. *Illinois*, *supra*, 408 U.S. at 795, or, as Echeona would have it here, investigatory work involving other cases. There is nothing in the redacted portions of the report that in the slightest suggests that the persons mentioned there could have been of any assistance whatsoever to Echeona or would have impeached the testimony of the Government's witnesses. Moreover, as Echeona quite rightly divines, the redacted portions of the report refer to persons implicated by Albarracin in large narcotics trans-

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417 U.S. 970 (1974); *United States* v. *Fried*, 486 F.2d 201 (2d Cir. 1973), *cert. denied*, 416 U.S. 983 (1974); *United States* v. *Bonanno*, 430 F.2d 1060 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970); or (2) an agreement between the prosecutor and the witness that such misconduct will be forgiven in return for his trial testimony, *Giglio* v. *United States*, 405 U.S. 150 (1972), or (3) even, perhaps, a pending investigation of a target, *cf. United States* v. *Miles*, 480 F.2d 1215 (2d Cir. 1973). The contents of the redacted portions of the report fall into none of these categories, and no case is cited by Echeona which suggests any obligation under *Brady* to reveal such material.

actions. While Echeona asserts he "might" have called such persons to testify as defense witnesses, "there is not a shred of evidence that [they] would have waived the Fifth Amendment to take the stand here." *United States* v. *Kahn*, 472 F.2d 272, 288 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).*

Echeona requests as alternative relief that the procedure of *United States* v. *Clark*, 475 F.2d 240 (2d Cir. 1973) and *United States* v. *Bell*, 464 F.2d 667 (2d Cir. 1972) be followed here, to allow defense counsel to examine the redacted material and thereafter submit a sealed brief arguing the relevance of the redacted material. *Clark* and *Bell* are inapposite, since they involved *in camera* hearings with the defendant excluded on the issue of the confidential hijacker profile. With respect to 3500 material, Congress has legislated a specific procedure to be followed when the Gov-

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* Echeona also mocks the Government's alternative argument below that the redacted material should be withheld because it concerned individuals who were actively under investigation for significant narcotics violations (Brief at 14-15). This Court need not consider his arguments on this point since, for the reasons stated, Echeona was not entitled under either Section 3500 or *Brady* to the material the District Court withheld. However, even if the redacted material had had slightly more relevance to Echeona's case than it did, we respectfully submit that the observations of the Supreme Court in a slightly different context are pertinent here:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

Roviaro v. *United States*, 353 U.S. 53, 62 (1957). See also *United States* v. *Soles*, 482 F.2d 105, 108-110 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973).

ernment maintains that a statement should not be disclosed, and that procedure was followed. Title 18, United States Code, Section 3500(c). This Court has approved of the procedure which requires the trial judge, as the impartial arbiter, to rule on what material is to be turned over, and has held it to be constitutional. *United States* v. *McGuire*, 381 F.2d 306, 319 (2d Cir.), *cert. denied*, 389 U.S. 1053 (1967). No departure from that settled procedure is warranted in this case.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALAN R. KAUFMAN,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
Of Counsel.